82-1911

Office-Supreme Court, U.S.
FILED
MAY 25 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1983

NO. _____

JAMES GRESHAM GIBSON,

PETITIONER,

VS.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

E. N. ZEIGLER

COUNSEL FOR PETITIONER

246 WEST EVANS STREET
FLORENCE, SOUTH CAROLINA 29501

(303) 662-3281

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF RETAINED COUNSEL IS VIOLATED BECAUSE OF THE DEGREE OF INEFFECTIVENESS AND INCOMPETENCE OF COUNSEL.

2. WHETHER THE FOURTEENTH AMENDMENT RIGHT TO THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW AND THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY ARE VIOLATED WHEN A SENTENCE IS HANDED DOWN, THE DEFENDANT TAKEN INTO CUSTODY PENDING FILING OF AN APPEAL BOND, AND, ON MOTION TO DECREASE THE SENTENCE, THE TRIAL JUDGE, INSTEAD, INCREASED IT ON RESENTENCING.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	4
REPORTS OF OPINION BELOW	6
GROUNDS FOR JURISDICTION	6
CONSTITUTIONAL PROVISIONS INVOLVED	7
STATEMENT OF THE CASE	9
REASONS FOR THE ALLOWANCE OF THE WRIT	14
CONCLUSION	24
APPENDICES TO THE BRIEF	
APPENDIX A: OPINION OF THE SOUTH CAROLINA SUPREME COURT IN THIS CASE DATED JANUARY 17, 1983	25
APPENDIX B: RELEVANT PORTIONS OF TRIAL TRANSCRIPT	27
APPENDIX C: PORTION OF ORDER OF COMMITMENT DATED MARCH 17, 1982	35
APPENDIX D: PORTION OF ORDER OF COMMITMENT DATED MARCH 25, 1982	38
APPENDIX E: OPINION OF THE SOUTH CAROLINA SUPREME COURT DENYING HEARING DATED MARCH 29, 1983	41

PAGE

APPENDIX F: PORTION OF EXCEPTIONS TO LOWER COURT'S SENTENCE 43

APPENDIX G: PORTION OF THE BRIEF OF THE PETITIONER IN THE SOUTH CAROLINA SUPREME COURT CONCERNING THE ISSUES WHICH ARE THE SUBJECT OF THIS PETITION 45

TABLE OF AUTHORITIES

CASES	PAGE
BEASLEY V. UNITED STATES, 491 F. 2D 687 (6TH CIR. 1974)	18
BRUBAKER V. DICKSON 310 F. 2D 30, 37 (9TH CIR. 1962)	19
DILLANE V. UNITED STATES 350 F. 2D 733 (D.C. CIR. 1965)	19
FITZGERALD V. ESTELLE 505 F. 2D 1334, 1336 (1974), CERT. DENIED 422 U. S. 1011 (1975)	17,18
HUDSPETH V. MCDONALD 120 F. 2D 962 (10TH CIR. 941)	19
LIPUMA V. DEPARTMENT OF CORRECTIONS 560 F. 2D 84, 90 (2ND CIR. 1977)	17
MARANDO V. UNITED STATES 374 F. 2D 583 (1ST CIR. 1967)	21
MARZULLO V. MARYLAND 56 F. 2D 540, 543 (4TH CIR. 1977)	17,47
MCMANN V. RICHARDSON 397 U.S. 759 (1970)	14,16
MOORE V. UNITED STATES 432 F. 2D 730, 737 (3RD CIR. 1970)	17
PATTON V. STATE OF NORTH CAROLINA 381 F. 2D 636 (4TH CIR. 1967)	22,23,64
SCALF V. BENNETT 408 F. 2D 325, 327, 328 (8TH CIR. 1969)	18

STATE V. LEONARD
39 WIS. 2D, 159 N. W. 2D
577 (1968) 20

UNITED STATES EX REL. FEELEY V. RAGEN
166 F. 2D 976 (7TH CIR. 1948) 18

UNITED STATES V. RAMIREZ
535 F. 2D 125, 129 (1ST CIR. (1976) 16,17

UNITED STATES EX REL. STARNER V. RUSSELL
378 F. 2D 808 (3D CIR. 1967) 21

OTHER AUTHORITIES

ANNOT., 2 A.L.R. 4TH 27, 45 16

STRAZELLA, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: NEW USES, NEW PROBLEMS
19 ARIZ. L. REV. 405 (1977) 14

REPORTS OF OPINION BELOW

THE SUPREME COURT OF SOUTH CAROLINA IN PER CURIAM MEMORANDUM OPINION 83-MO-4 (UNPUBLISHED) FILED JANUARY 17, 1983, (APPENDIX A) AFFIRMED THE SENTENCE OF THE LOWER COURT DATED MARCH 25, 1982. IN AN ADVISORY LETTER DATED MARCH 29, 1983 THE SUPREME COURT OF SOUTH CAROLINA DENIED THE PETITION FOR A REHEARING. (APPENDIX E).

GROUNDS FOR JURISDICTION

THE OPINION OF THE SUPREME COURT OF SOUTH CAROLINA WAS ENTERED ON JANUARY 17, 1983. A PETITION FOR REHEARING WAS TIMELY FILED AND WAS DENIED ON MARCH 29, 1982 (SEE APPENDIX C). THIS PETITION FOR CERTIORARI WAS FILED WITHIN SIXTY (60) DAYS AFTER THE ENTRY OF THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA.

THE QUESTIONS RAISED ON APPEAL WERE FULLY BRIEFED BUT NOT ARGUED ORALLY. THE SUPREME COURT OF SOUTH CAROLINA DECLINED TO DEAL WITH THOSE QUESTIONS IN ITS MEMORANDUM OPINIONS (SEE APPENDICES A AND E).

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U. S. C. SEC. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT FIVE.

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

CONSTITUTION OF THE UNITED STATES,

AMENDMENT SIX.

IN ALL CRIMINAL PROCEEDINGS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC

TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

CONSTITUTION OF THE UNITED STATES,

AMENDMENT FOURTEEN, SECTION I.

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, ARE SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

THE PETITIONER WAS ARRESTED ON APRIL 28, 1981.

IN THE SEPTEMBER, 1981 TERM OF GENERAL SESSIONS COURT, THE FLORENCE COUNTY GRAND JURY RETURNED A TRUE BILL TO AN INDICTMENT AGAINST PETITIONER, MARION BARFIELD AND STEPHEN GODFREY WITH HOUSEBREAKING (FIVE COUNTS), GRAND LARCENY (EIGHT COUNTS), RECEIVING STOLEN GOODS (THREE COUNTS), AND BURNING PERSONAL PROPERTY TO DEFRAUD INSURER (ONE COUNT). ALL COUNTS AGAINST BARFIELD AND GODFREY WERE DISPOSED OF BY GUILTY PLEAS LEAVING ONLY COUNT SEVEN (7) IN THE INDICTMENT WHICH CHARGED PETITIONER WITH RECEIVING STOLEN GOODS. ON MARCH 16, 1982, THE SOLICITOR CALLED FOR THE TRIAL OF PETITIONER ON COUNT SEVEN (7) OF THE INDICTMENT.

UPON THE CALL OF THE CASE FOR TRIAL, ATTORNEY FOR PETITIONER MOVED FOR A DISMISSAL ON THE GROUND THAT PETITIONER HAD BEEN DENIED HIS RIGHT TO A SPEEDY TRIAL. THE TRIAL JUDGE

DENIED THE MOTION AND THE CASE CAME ON FOR TRIAL BEFORE JUDGE JOHN H. WALLER, JR., JUDGE OF THE TWELFTH JUDICIAL CIRCUIT, AND A JURY. THE CASE WAS TRIED DURING THE TERM OF GENERAL SESSIONS COURT FOR FLORENCE COUNTY WHICH BEGAN ON MARCH 15, 1981. PETITIONER WAS REPRESENTED THROUGHOUT THE TRIAL BY SAMUEL MITCHELL, ESQUIRE, OF THE FLORENCE COUNTY BAR. COUNSEL FOR PETITIONER MOVED FOR A DISMISSAL OF THE CHARGE AT THE CLOSE OF THE TESTIMONY FOR THE PROSECUTION, AND THE TRIAL JUDGE DENIED THE MOTION.

THE JURY DELIBERATED FOR FOUR (4) HOURS AND HAVING RETURNED TO THE COURTROOM TWICE TO HEAR EXCERPTS FROM THE TESTIMONY OF WITNESSES PLAYED. AFTER THE FIRST TWO HOURS OF DELIBERATION, A NOTE WAS SENT THE COURT SIGNED BY THE FORELADY WHICH SAID, "YOUR HONOR, WE CANNOT COME TO A TOTAL VOTE. THERE IS A 7-5 SPLIT. IT HAS NOT CHANGED FOR TWO HOURS." THE COURT ALLOWED THE JURY TO CONTINUE TO DEBATE. AFTER APPROXIMATELY AN HOUR AND A HALF FROM THE FIRST APPEARANCE, THE JURY STATED THAT IT WISHED TO HEAR A PORTION OF ANOTHER WITNESS' TESTIMONY. THE JURY RETURNED A VERDICT

OF GUILTY EIGHT MINUTES AFTER HEARING THIS TESTIMONY.

PETITIONER'S COUNSEL MADE A MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR FOR A NEW TRIAL. BOTH MOTIONS WERE DENIED. THE TRIAL JUDGE THEN SENTENCED PETITIONER TO THE CUSTODY OF THE BOARD OF CORRECTIONS FOR A TERM OF THREE (3) YEARS AND THREE (3) YEARS PROBATION.

THE DAY FOLLOWING THE SENTENCING OF PETITIONER ON MARCH 17, 1982, E. N. ZEIGLER, ATTORNEY, THEN REPRESENTING PETITIONER, NOTED HIS APPEARANCE WITH MR. MITCHELL FOR THE PURPOSE OF SEEKING A REDUCTION IN THE SENTENCE GIVEN BY THE HONORABLE JOHN H. WALLER, JR. ON THE PREVIOUS DAY. ON MARCH 25, 1982 IN THE WEEK FOLLOWING THE SENTENCING, MR. ZEIGLER APPEARED ALONE INFORMING THE COURT THAT MR. MITCHELL WAS NOT AT THAT TIME IN THE STATE AND HAD REQUESTED THAT HE APPEAR ALONE ON PETITIONER'S BEHALF. THEREAFTER MR. ZEIGLER HAS ACTED AS COUNSEL FOR PETITIONER IN FILING AND PERFECTING HIS APPEAL

TO THE SUPREME COURT.

ON MARCH 25, 1982, THE TRIAL COURT HEARD ARGUMENT ON THE MOTION AND UPON RECONSIDERATION SENTENCED THE PETITIONER TO THE CUSTODY OF THE BOARD OF CORRECTIONS FOR A TERM OF EIGHT (8) YEARS; PROVIDED THAT UPON SERVICE OF ONE (1) YEAR THE BALANCE OF THE SENTENCE BE SUSPENDED AND THE PETITIONER BE PLACED ON FIVE (5) YEARS PROBATION. AS A SPECIAL CONDITION, THE COURT ORDERED THAT PETITIONER PAY A TWENTY ($20) DOLLAR ASSESSMENT FEE TO THE FLORENCE COUNTY CLERK OF COURT THIRTY (30) DAYS AFTER RELEASE AND MAKE RESTITUTION TO THE FLORENCE COUNTY CLERK OF COURT IN THE AMOUNT OF TWO THOUSAND ($2,000) DOLLARS FOR TOMMY STROMAN WITHIN THE FIRST YEAR.

NOTICE OF INTENTION TO APPEAL WAS FILED ON MARCH 26, 1982.

THE FEDERAL ISSUES WERE RAISED BY WAY OF EXCEPTIONS FILED AS PART OF THE APPEAL TO THE SOUTH CAROLINA SUPREME COURT (SEE

EXCEPTIONS 8, 9, AND 10, APPENDIX F, P. 43). THE FEDERAL QUESTION WAS BRIEFED BY APPELLANT IN THE APPEAL TO THE SOUTH CAROLINA SUPREME COURT. (SEE QUESTIONS III AND V, APPENDIX G P. 45, 57).

THE SOUTH CAROLINA SUPREME COURT AFFIRMED THE SENTENCE GIVEN TO APPELLANT IN A MEMORANDUM OPINION FILED JANUARY 17, 1983 AND DENIED A PETITION FOR REHEARING ON MARCH 29, 1983.

REASONS FOR ALLOWANCE OF THE WRIT

I. WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF RETAINED COUNSEL IS VIOLATED BECAUSE OF THE DEGREE OF INEFFECTIVENESS AND INCOMPETENCE OF COUNSEL.

THIS QUESTION PRESENTS TO THE UNITED STATES SUPREME COURT THE QUESTION LEFT UNDECIDED IN MCMANN V. RICHARDSON, 397 U.S. 759 (1970): VIZ, WHAT IS THE LIMIT BEYOND WHICH COUNSEL'S COMPETENCE FAILS TO SATISFY THE SIXTH AMENDMENT RIGHT OF AN ACCUSED IN A CRIMINAL CASE TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

IN MCMANN, THE COURT RECOGNIZED THE VALIDITY OF A CLIAM OF THE INEFFECTIVENESS OF COUNSEL IN RESPECT TO ADVISING A GUILTY PLEA. SEE STRAZELLA, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: NEW USES, NEW PROBLEMS, 19 ARIZ. L. REV. 450 (1977). IN THAT ARTICLE IT IS POINTED OUT, HOWEVER, THAT THE COURT DID NOT PROVIDE THE NECESSARY GUIDELINE FOR THE DETERMINATION OF "THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES." ACCORDINGLY, THE STATE AND FEDERAL COURTS HAVE CONTINUED TO USE VAGUE AND SOMETIMES CONFLICTING TERMS IN AN ATTEMPT TO DEFINE THE PERMISSIBLE LIMIT TO

THE INADEQUENCY OF COUNSEL OR AS IN THE CASE AT BAR, SIMPLY HAVE REFUSED TO DEAL WITH THE QUESTION IN A WRITTEN OPINION. THE DISTINCTION BETWEEN MCMANN AND THIS CASE SHOULD BE NOTED. IN MCMANN, THE ADVICE OF COUNSEL IN FAVOR OF A GUILTY PLEA WAS HELD TO BE REASONABLY COMPETENT ADVICE EVEN THOUGH COUNSEL MAY HAVE MISJUDGED THE ADMISSIBILITY OF THE DEFENDANT'S CONFESSION. IN THIS CASE, THE INCOMPETENCE OF TRIAL COUNSEL IS BASED ON AN ARRAY OF DELICTS, WHICH ARE AS FOLLOWS: (1) COUNSEL'S FAILURE TO TAKE EXCEPTION TO CERTAIN MATTERS WHICH OCCURRED IN THE JURY ROOM; (2) HIS FAILURE TO MOVE FOR A CONTINUANCE IN ACCORDANCE WITH THE RULES OF PRACTICE FOR CIRCUIT COURTS OF SOUTH CAROLINA; (3) HIS FAILURE TO PRESENT TWO WITNESSES VITAL TO THE DEFENSE; AND (4) HIS FAILURE TO MOVE THAT THE ENTIRE TESTIMONY, RATHER THAN PART OF IT, BE READ TO THE JURY. THESE INSTANCES OF INCOMPETENCE ARE IN THE APPENDIX TO THIS PETITION. (APP.F , P. 43). THE INCOMPETENCE OF COUNSEL CLEARLY SEEMS TO HAVE LEFT THIS DEFENDANT "TO THE MERCIES OF INCOMPETENT COUNSEL"

AND NOT TO HAVE GIVEN DEFENDANT ADVICE BASED ON INFORMED PROFESSIONAL JUDGMENT BUT ON NEGLECT OR IGNORANCE. SEE MCMANN, SUPRA, 770. IT IS SUGGESTED THAT THE SUPREME COURT OF SOUTH CAROLINA'S FAILURE TO COMMENT ON THIS ISSUE AND TO DISMISS IT UNDER SOUTH CAROLINA SUPREME COURT RULE 23, WITHOUT OPINION, INDICATES THE NECESSITY FOR CLARIFICATION BY THIS COURT IN VIEW OF THE ABSENCE OF "PROPER STANDARDS OF PERFORMANCE BY ATTORNEYS WHO ARE REPRESENTING DEFENDANTS IN CRIMINAL CASES IN THEIR COURTS." SEE MCMANN, SUPRA, AT 771. THIS ABSENCE OF A MANAGEABLE STANDARD IS NOT UNIQUE TO THE STATE OF SOUTH CAROLINA, AS CAN BE SEEN BY THE ARRAY OF STATE STANDARDS CITED IN 2 A.L.R. 4TH, 27, 45.

A REVIEW OF THE FEDERAL COURTS SHOWS THAT THEY PROVIDE LITTLE ASSISTANCE TO THE STATES IN SUPPLYING THE "PROPER STANDARDS OF PERFORMANCE BY ATTORNEYS" MENTIONED IN MCMANN BECAUSE OF THEIR VARIETY. IN THE FIRST CIRCUIT, THE COURT STATES, "INEFFECTIVE COUNSEL MEANS REPRESENTATION SUCH AS TO MAKE A MOCKERY, A SHAM, OR A FARCE OF THE TRIAL." UNITED

STATES V. RAMIREZ, 535 F. 2D 125, 129 (1ST CIR. 1976). SIMILAR TO THE FIRST CIRCUIT, THE SECOND CIRCUIT HAS HELD THAT "INEFFECTIVE ASSISTANCE OF COUNSEL MUST BE SO WOEFULLY INADEQUATE AS TO SHOCK THE CONSCIENCE OF THE COURT AND MAKE THE PROCEEDINGS A FARCE AND A MOCKERY OF JUSTICE." LIPUMA V. DEPARTMENT OF CORRECTIONS, 560 F. 2D 84, 90 (2ND CIR. 1977). THE THIRD CIRCUIT STATED THAT A DEFENDANT IS DENIED HIS DUE PROCESS RIGHT WHEN THE COURT OBSERVES THAT HIS/HER COUNSEL IS "SO LACKING IN COMPETENCY OR GOOD FAITH" AS TO CREATE A FARCE AND A MOCKERY OF JUSTICE". MOORE V. UNITED STATES, 432 F. 2D 730, 737 (3D CIR. 1970). THE "FARCE AND MOCKERY" TEST HAS BEEN REPLACED BY THE FOURTH CIRCUIT FOR THE NORMAL "RANGE OF COMPETENCY" TEST FOR DETERMINING THE EFFECTIVE ASSISTANCE OF COUNSEL. MARZULLO V. MARYLAND, 561 F. 2D 540, 543 (4TH CIR. 1977). ACCORDING TO THE FIFTH CIRCUIT, A DEFENDANT IS DEPRIVED OF HIS DUE PROCESS RIGHT IF HIS COUNSEL'S INEFFECTIVENESS HAS "RENDERED A TRIAL FUNDAMENTALLY UNFAIR". FITZGERALD V. ESTELLE, 505 F. 2D 1334, 1336 (5TH CIR. 1974).

CERT DENIED 422 U. S. 1011 (1975). AND IN THE SIXTH CIRCUIT INADEQUATE ASSISTANCE OF COUNSEL IS HELD TO OCCUR WHEN DEFENDANT'S COUNSEL ERRONEOUSLY ADVISES DEFENDANT ON A CLEAR POINT OF LAW WHICH LEADS TO THE DEPRIVATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL. BEASLEY V. UNITED STATES, 491 F. 2D 687 (6TH CIR. 1974).

LIKE THE FIRST, SECOND AND THIRD CIRCUITS, THE SEVENTH AND EIGHTH CIRCUITS RELY ON THE STANDARD OF A FARCE AND A MOCKERY. IN THE SEVENTH CIRCUIT, COUNSEL'S ASSISTANCE MUST BE OF SUCH A LOW CALIBER AS TO AMOUNT TO NO REPRESENTATION AND THUS CREATE A FARCE OF THE TRIAL. UNITED STATES EX REL. FEELEY V. RAGEN, 166 F. 2D 976 (7TH CIR. 1948). WHILE THE EIGHTH CIRCUIT HOLDS A SHAM OR A MOCKERY OF JUSTICE OCCURS WHEN COUNSEL'S "PURPORTED REPRESENTATION WAS ONLY PERFUNCTORY, IN BAD FAITH, A SHAM, A PRETENCE, OR WITHOUT ADEQUATE OPPORTUNITY FOR CONFERENCE AND PREPARATION". SCALF V. BENNETT, 408 F. 2D 325, 327, 328 (8TH CIR. 1969).

THE NINTH CIRCUIT HAS HELD THAT THE WHOLE "COURSE OF PROCEEDING AND ALL ATTENDING CIRCUMSTANCES" WILL BE EXAMINED TO DETERMINE IF COUNSEL IS "RENDERING REASONABLY EFFECTIVE ASSISTANCE". BRUBAKER V. DICKSON, 310 F. 2D 30, 37 (9TH CIR. 1962). WHILE THE TENTH CIRCUIT SEEMINGLY MAKES ONLY A DISTINCTION BETWEEN THE DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE INEFFECTIVE ASSISTANCE OF COMPETENT COUNSEL. HUDSPETH V. MCDONALD, 120 F. 2D 962 (10TH CIR. 1941). AND LASTLY, THE DISTRICT OF COLUMBIA CIRCUIT HAS HELD THAT INEFFECTIVE ASSISTANCE OF COUNSEL OCCURS WHEN COUNSEL'S INATTENTION TO A CLIENT'S INTERESTS BECOMES EXTRAORDINARY. DILLANE V. UNITED STATES, 350 F. 2D 733 (D.C. CIR. 1965).

2. WHETHER THE FOURTEENTH AMENDMENT RIGHT TO THE DUE PROCESS AND EQUAL PROTECTION AGAINST DOUBLE JEOPARDY ARE VIOLATED WHEN A SENTENCE IS HANDED DOWN, THE DEFENDANT TAKEN INTO CUSTODY PENDING FILING OF AN APPEAL BOND, AND, ON MOTION TO DECREASE THE SENTENCE, THE TRIAL JUDGE, INSTEAD, INCREASED IT ON RESENTENCING.

THIS QUESTION PRESENTS TO THE UNITED STATES SUPREME COURT A CONTROVERSY WITHIN THE

FEDERAL CIRCUITS AS TO WHEN A FIFTH AMENDMENT VIOLATION OF DOUBLE JEOPARDY OCCURS UPON AN INCREASED SENTENCE ON RESENTENCING. THIS CONFLICT IS SET FORTH IN THE OPINION IN STATE V. LEONARD, 39 WIS. 2D, 159 N. W. 2D 577 (1968). IT IS NOTED BY THE WISCONSIN COURT THAT THE FEDRERAL CIRCUITS PRESENT THREE ALTERNATIVE APPROACHES TO THIS CONTROVERSY, WHICH ARE DISCUSSED BELOW.

THE FIRST ALTERNATIVE WOULD BE TO ALLOW A MORE SEVERE SENTENCING WITHOUT LIMITATION. UNITED STATES EX REL. STARNER V. RUSSELL, 378 F 2D 808 (3D CIR. 1967). IN UNITED STATES EX REL. STARNER V. RUSSELL, THE DEFENDANT WAS CONVICTED ON TEN (10) COUNTS. WHEN DEFENDANT'S CONVICTION WAS SET ASIDE ON HABEAS CORPUS AND A NEW TRIAL WAS HELD, TWO (2) OF THE TEN (10) COUNTS WERE WITHDRAWN. THE DEFENDANT PLEADED NOT GUILTY AND THE SENTENCE HANDED DOWN TURNED OUT TO BE GREATER THAN THE VACATED FIRST SENTENCE. IN RATIONALIZING ITS DECISION, THE THIRD CIRCUIT STATED THAT THE DEFENDANT HAD WIPED THE SLATE CLEAN WHEN HE APPEARED AND PLEADED GUILTY IN THE SECOND TRIAL.

THEREFORE, THE TRIAL JUDGE, WHEN A NEW TRIAL WAS ORDERED, COULD IMPOSE A SENTENCE GREATER THAN ONE HE HAD EARLIER VACATED.

CLEARLY, THE FACTS IN THE CASE AT BAR ARE DISTINGUISHABLE FROM UNITED STATES EX REL. STARNER V. RUSSELL. ALTHOUGH WITHIN THE CUSTODY OF THE STATE, THE DEFENDANT WAS NEITHER SITTING IN A NEW TRIAL NOR ALTERING HIS PLEA. INSTEAD, HIS INCREASED SECOND SENTENCE WAS DELIVERED ON A MERE MOTION FOR A SENTENCE REDUCTION.

THE SECOND ALTERNATIVE IN THE FEDERAL CIRCUITS TO AN INCREASED SENTENCE ON RESENTENCING IS SEEN IN MARANO V. UNITED STATES, 374 F. 2D 583 (IST CIR. 1967). IN MARANO IT WAS HELD THAT AN INCREASED SENTENCE IS PROHIBITED UNLESS NEW EVENTS OCCUR AND ARE BROUGHT TO THE COURT'S ATTENTION SUBSEQUENT TO THE FIRST SENTENCE. THE COURT NOTED THAT ANY INCREASE IN SENTENCE MUST BE ACCOMPLISHED BY AN AFFIRMATIVE EXPLANATION FOR THAT INCREASE.

APPELLANT CONTENDS THAT ACCORDING TO THE MARANO ALTERNATIVE THE INCREASED SENTENCE IN

THIS CASE IS NOT PROPER. THE RECORD SHOWS THAT NO NEW EVENTS OCCURRED BETWEEN DEFENDANT'S FIRST SENTENCE AND HIS INCREASED SECOND SENTENCE. IN ADDITION TO THAT, THE TRIAL JUDGE FAILED TO GIVE ANY AFFIRMATIVE REASON FOR THE SENTENCE INCREASE.

THE THIRD AND LAST ALTERNATIVE IN THE FEDERAL CIRCUITS IS AN ABSOLUTE PROHIBITION ON AN INCREASED SENTENCE. PATTON V. STATE OF NORTH CAROLINA, 381 F. 2D 636 (4TH CIR. 1967). IN PATTON, THE DEFENDANT WAS GRANTED A NEW TRIAL BECAUSE HE WAS WITHOUT REPRESENTATION AT HIS FIRST TRIAL. UPON RETRIAL THE JUDGE INCREASED DEFENDANT'S SENTENCE. THE FOURTH CIRCUIT HELD THAT THIS INCREASE UPON RESENTENCING WAS A DENIAL OF BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES. THE COURT WENT ON TO STATE THAT A PROHABITION AGAINST INCREASED SENTENCES ON RESENTENCING IS NECESSARY IN ORDER THAT DEFENDANTS WHO HAVE BEEN UNCONSTITUTIONALLY CONVICTED WILL NOT BE DETERRED FROM PURSUING THEIR RIGHT TO A NEW TRIAL DUE TO THE RISK OF A GREATER SENTENCE.

IT IS CONTENDED THAT THIS CONSTITUTIONAL REASONING IN PATTON IS APPLICABLE TO THE FACTS AT BAR. ALTHOUGH THE SOUTH CAROLINA SUPREME COURT REJECTED APPELLANT'S ARGUMENT UNDER PATTON (CITED IN APPELLANT'S BRIEF, APP.E P.43,44), IT IS APPARENT THAT DEFENDANT WOULD HAVE BEEN DETERRED FROM PURSUING HIS PROCEDURAL RIGHT TO MOVE FOR A REDUCED SENTENCE IF THERE EXISTED A RISK OF A GREATER SENTENCE. CLEARLY, THE SENTENCE OF THE TRIAL JUDGE WAS AN ANOMOLY AND HAD TO BE CORRECTED. AS IN PATTON, THE APPELLANT WAS PLACED IN DOUBLE JEOPARDY, DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND HIS EQUAL PROTECTION RIGHTS. IT IS SUBMITTED THAT THE TRIAL COURT ON MOTION TO REDUCE THE SENTENCE WAS LIMITED TO AN APPROPRIATE RESENTENCE WHICH COULD NOT HAVE EXCEEDED THREE (3) YEARS IMPRISONMENT AND, IF PART OF THE SENTENCE WAS SUSPENDED, THREE (3) YEARS PROBATION.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITIONER RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

Eugene Noel Zeigler

EUGENE NOEL ZEIGLER
COUNSEL FOR PETITIONER

APPENDIX A

THE STATE OF SOUTH CAROLINA

In The Supreme Court

The State . . . . . Respondent,

v.

James Gresham Gibson . . . . . Appellant.

Appeal from Florence County

John H. Waller, Jr., Judge

Memorandum Opinion No. 83-MO-4

Filed January 17, 1983

AFFIRMED

E. N. Zeigler, of Florence, for appellant.

State Attorney Carolyn M. Adams, of Columbia; and Solicitor Dudley Saleeby, Jr., of Florence, for respondent.

PER CURIAM: Appellant was convicted of receiving stolen goods and was sentenced to an eight (8) year term of imprisonment suspended upon service of one (1) year with five (5) years' probation. As a special condition, the trial judge directed appellant to pay a twenty

$20.00) dollar Assessment Fee to the Florence County Clerk of Court and make restitution to the victims in the amount of two thousand ($2,000.00) dollars.

After careful consideration of the record and briefs, we are of the opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ George T. Gregory, Jr. A.J.

J. B. Ness and David W. Harwell, JJ, not participating.

APPENDIX B

Proceedings before the court on March 17, 1982:

COURT: Needless to say, this sentence is giving me a great deal of difficulty. Anything further?

MR. MITCHELL: Your Honor, if you would take those things into consideration, we would hope that you would be as lenient as you could see your way clear to do.

COURT: I waive the $20.00 on Indictment 81-675 to the Victim Restitution Fund. The sentence of the court on Indictment 81-675 is that the defendant be confined to the Department of Corrections for the State of South Carolina for a period of three (3) years, and that you thereafter be on probation for a period of three (3) years. Of course, you're gonna have to pay the cost of probation while you're on probation.

MR. MITCHELL: Your Honor, I know you've made your ruling and handed down the sentence, but in no way do we feel that if Mr. Gibson serves that kind of time that would be of any

benefit to him or to society, the people of Florence County, and we would ask that you take into consideration that he has no past--

COURT: I have taken it all into consideration; I really have. It gave me a great deal of difficulty, a great deal. You may now renew your motion for an appeal bond.

MR. MITCHELL: We would ask at this time that an appeal bond be set, and we hope that it would be an amount that ---

COURT: I'll set an appeal bond at EIGHT THOUSAND ($8,000.00) DOLLARS, posted by at least two sufficient sureties.

MR. MITCHELL: Your Honor, due to the hour, is there any way that we could be released tonight and post an appeal bond on---

COURT: What's the position of the State?

MR. WELLS: Your Honor, of course, I leave that completely up to you. I think under the procedure, of course, unless a bond is posted--- But I'll leave that up to Your Honor.

COURT: You're asking me to take an awful lot on my shoulders, Mr. Mitchell.

MR. MITCHELL: Your Honor, this man has lived here all of his life; he owns property here and his family is here. I just can't envision him going anywhere tonight-- he has too many ties to the town and the county, in my opinion; and I've known him for 15 years.

COURT: Why don't you try to get that? I'm gonna be here for an hour or two. Why don't you try to get that appeal bond done so you can get him out tonight. It's just five minutes after 5:00. There's nothing in the bond that says it has to be okayed by the clerk, or anything of that nature.

* * * * * * *

[Thereafter, on March 18, 1982, at 11:35 a.m., this matter was again before the court, with E. N. Zeigler, Attorney, appearing in behalf of the defendant.]

COURT: All right, sir, I'll entertain your motion.

MR. ZEIGLER: If Your Honor please, I am associated with Mr. Sam Mitchell in representing Mr. Gibson. He was sentenced

yesterday by Your Honor, as I understand it, to three (3) years with the Department of Corrections, and three (3) years probation. We would like to move for Your Honor to reconsider the sentence, with a view to reducing the sentence. I would like to make the motion; if Your Honor doesn't want to hear it now, since Mr. Mitchell is in Myrtle Beach---

COURT: Well, I'm right in the middle of a trial, though. But I'll note for the record that I have and retained jurisdiction of this so I can hear it at a later time, even though it may be beyond this week.

MR. ZEIGLER: Thank you, Your Honor.

* * * * * *

Proceedings before the court on March 25, 1982:

THE COURT: The motion has been made before me to reconsider the sentence that I gave on last week on Indictment 81-675, with reference to the defendant James Gresham Gibson.

MR. ZEIGLER: If Your Honor please, Mr. Sam Mitchell is not in the state, and he has asked me to appear on behalf of Mr. Gibson.

I know one of the most difficult tasks a judge has to perform is passing sentence on people, so I don't, for one moment, minimize the difficulties Your Honor faces in a case of this sort. I am reminded, however, of what your predecessor, Judge Lyde, once said. It is not the severity of the punishment, but the certainty of punishment which has the greatest effect on society.

My client is asking a reduction in the sentence which Your Honor earlier imposed upon the ground that it would work an undue hardship on him, and since this is a first offense and the evidence, as I understand it, all but one piece of evidence was circumstantial. He is willing, although he still says that he did not receive stolen goods, if it will make any difference in Your Honor's sentence, to make restitution to those person's (sic) who have lost any goods by reason of the theft which gave rise to the charge of receiving stolen goods.

* * * * * *

[THE COURT]: I worried over this sen-

tence when I first imposed it. I think it is extremely evident in the sentence that I gave that I had a problem with it, in that I sentenced the gentleman to three years and gave him three years probation, and you and I both know that that is just inconsistent. But I tell you that to further tell you that, at the time I first was considering the sentence, I was going to give him either five or seven years, suspended to three years, and then give him three years probation. And at the last moment, giving the Defendant the benefit of everything that I could give him, changed the portion of what I had written before me from five to seven, suspended to three, and just changed it to a straight three with three years probation.

In that regard, I do want to change the sentence. I do not want the three years probation. Anything that you wish to say?

MR. GIBSON: Your Honor, I would reiterate that I have always been a law abiding citizen. I know in my heart I am innocent

of these charges. And as I said before, I am at your mercy, I am at the mercy of the Court, and that is the only thing I can possibly say at this time.

THE COURT: Does the State have anything that you wish to say?

MR. WELLS: No, Your Honor, we don't. We will leave the sentencing in your discretion.

* * * * * *

THE COURT: Who are the victims in this particular instance? Who was out?

MR. WELLS: It would be Mr. and Mrs. Thomas Stroman. She told me that as far as the guns that the Fludd's estimated the value at about $3,000 and that insurance had paid $1,000 of that, is what she told me.

THE COURT: All right. The sentence of the Court on Indictment 81-675, after having reconsidered the sentence, taking into consideration that the Defendant is a first offender, taking into consideration that the victims are out and at a loss of $2,000,

although I don't favor changing a sentence once it has been imposed, I am going against by doing this, and the sentence on Indictment 81-675 is that the Defendant be confined to the Department of Corrections for the State of South Carolina for a period of eight years, but I suspend that upon the service of one year, and that you thereafter be on probation for a period of five years. Of course, you are going to have to pay $120 for each year that you are on probation. And within 30 days after you begin your probation, you are to pay $20 for the Victim Restitution Fund on this indictment.

In addition to that, and as a special condition to your probation, is that, within the first year of your probation period, you are to make restitution to Mr. Thomas Stroman in the amount of $2,000.

* * * * * *

APPENDIX C

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

COURT General Sessions

March 15, 1982

STATE

v.

James Gresham Gibson

Defendant

OFFENSE Receiving Stolen Goods, Indictment #81-GS-21-675

The sentence of the Court is that the defendant, James Gresham Gibson shall be in the custody of the Board of Corrections of the state of South Carolina for a term of Three (3) Years xxxxxxxxxxx _____ xxxxxxxxxxxxxxxxxxxx_____ xxxxxxxxxxxxxxxxx _____ that the xxxxxxxxxxxx aforesaid sentence be and the same xxxxxxxxxxx said defendant is hereby placed on probation for a period of Three (3) years under the supervision of the laws of this state and the rules and orders of the

Board and its agents, with leave that the suspended sentence may be revoked at any time during the period of probation at Chambers, or in Open Court, upon recommendation of said Board.

* * * * * *

SPECIAL CONDITIONS AS ORDER (sic) BY THE COURT: Assessment fee waived. Appeal bond of $8,000.00 to be posted by at least 2 sureties.

On motion of the defendants attorney this sentence was reconsidered and a new sentence give (sic). See another form for the probation on the final sentence. [Handwritten by Judge John H. Waller].

* * * * * *

IT IS FURTHER ORDERED that the Sheriff or other law enforcement officers, who have the custody of the defendant, is hereby ordered to deliver said defendant to the Probation Office of this district, or if defendant is under bond, then such bond shall remain in full force until said defendant reports to the Probation Office. The conditions of probation

begin xxxxxxx (after service of required portion of suspended sentence). It is further ordered that this order be filed by the Clerk of Court in his office and that he forthwith forward copy (certified) to Probation Office or the South Carolina Parole and Community Corrections Board.

This 17th day of March, 1982, Florence, S. C.

s/John H. Waller, Jr.
Presiding Judge
Twelfth Judicial Circuit
John H. Waller, Jr.

APPENDIX D

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

COURT General Sessions

March 25, 1982

STATE

-vs-

James Gresham Gibson

Defendant

OFFENSE Receiving Stolen Goods, Indictment #81-GS-21-675

The sentence of the Court is that the defendant, James Gresham Gibson shall be in the custody of the Board of Corrections of the state of South Carolina for a period of Eight (8) Years xxxxxxxxxxxxxxx; provided that upon the service of One (1) year xxxxxxxxxxxxxxxxx _____ that the balance of the aforesaid sentence be and the same is hereby suspended and that the said defendant is hereby placed on probation for a period of Five (5) years under the supervision of the South Carolina Parole and Community Corrections Board and its

agents, subject to the provisions of the laws of this state and the rules and orders of the Board and its agents, with leave that the suspended sentence may be revoked at any time during the period of probation at Chambers, or in Open Court, upon recommendation of said Board

* * * * * *

SPECIAL CONDITIONS AS ORDER (sic) BY THE COURT: Pay $20 Assessment Fee to the Florence County Clerk of Court 30 days after release. Make Restitution to the Florence County Clerk of Court in the amount of $2,000.00 for Tommy Stroman within the first year.

* * * * * *

IT IS FURTHER ORDERED that the Sheriff or other law enforcement officers, who have the custody of the defendant, is hereby ordered to deliver said defendant to the Probation Office of this district, or if defendant is under bond, then such bond shall remain in full force until said defendant reports to the Probation Office. The conditions of

probation begin xxxxx (after service of required portion of suspended sentence). It is further ordered that this order be filed by the Clerk of Court in his office, and that he forthwith forward copy (certified) to Probation Office or the South Carolina Parole and Community Corrections Board.

This 25th day of March, 1982, Florence, S. C.

s/ John H. Waller, Jr.
Presiding Judge
Twelfth Judicial Circuit
John H. Waller, Jr.

APPENDIX E

THE SUPREME COURT OF SOUTH CAROLINA

March 29, 1983

E. N. Zeigler, Esquire

P. O. Drawer 150

Florence, South Carolina 29503

Re: The State v. James Gresham Gibson

Dear Mr. Zeigler:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

Petition Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ George T. Gregory, Jr. A.J.

March 29, 1983.

Your Petition for Stay of Remittitur Pending Disposition of Petition for Writ of Certiorari in the United States Supreme Court has been granted in the following order:

Petition for Stay granted for sixty days pending application to U. S. Supreme Court.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ George T. Gregory, Jr. A.J.

March 29, 1983.

Sincerely yours,

s/ Frances H. Smith

CLERK

APPENDIX F

Portion of exceptions to lower court's sentence:

8. That the trial court erred and abused its discretion in increasing the sentence imposed on him at the hearing of the motion to reconsider and reduce the original sentence, the error being that after the imposition of the first sentence the appellant was held in custody until an appeal bond could be posted and the increase in sentence imposed by the court violated the due process and equal protection clauses of the State and Federal Constitutions and the protection against double jeopardy afforded by both the State and Federal Constitutions.

9. That the trial court erred and abused its discretion in failing to grant a new trial upon the ground that appellant had been denied a fair trial under the provisions of the State and Federal Constitutions, the error being that counsel for the appellant was ineffective and incompetent in that he failed

to produce as witnesses the wife of appellant and Steve Hinds, the testimony of both being vital to the defense of the appellant, and counsel also failed to move for a continuance and failed to comply with the provisions of Rule 27 of the Rules of Practice for the Circuit Courts of South Carolina.

10. That the trial court erred and abused its discretion in failing to grant a new trial upon the ground that appellant had been denied a fair trial under the provisions of the State and Federal Constitutions, the error being that counsel for the defendant was ineffective and incompetent in that he failed to move for a mistrial when it was discovered that one of the jurors who had been hearing testimony in the case was a former guard at the detention center during the time that arrests were made in this case, the error being that the court made no inquiry as to what if anything that juror had said to the others concerning his knowledge of the case.

APPENDIX G

QUESTION III.

WAS APPELLANT DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE OF THE ERRONEOUS RULINGS OF THE TRIAL COURT AND BECAUSE OF THE INEFFECTIVENESS AND INCOMPETENCE OF HIS COUNSEL?

Two of appellant's exceptions raise the question of whether the appellant was deprived of his right to a fair trial under Article I, Section 3 and Section 14 of the Constitution of the State of South Carolina and under the Sixth and Fourteenth Amendments of the Constitution of the United States. While these exceptions deal primarily with the failure of trial counsel representing appellant to take exception to certain matters, move for a continuance complying with Rule 27 of the Rules of Practice for the Circuit Courts of South Carolina, and the failure to present two witnesses vital to the defense, they also raise the question of whether the trial court should not, in the interest of a fair trial,

have made certain that the rights of the appellant were adequately protected.

* * * * * * *

The South Carolina cases cited in this lengthy annotation [2 ALR 4th, 27] are placed under that section dealing with those jurisdictions which have not, or apparently have not, adopted one particular controlling test, or a specific combination of tests depending on counsel's status as appointed or retained or on the type of proceeding as to which the adequacy of counsel's representation is being challenged. It is there observed that in "Alabama, Louisiana, Mississippi, North Carolina, South Carolina, and Vermont cases, the courts applied or recognized a variety of ineffectiveness tests without, or evidently without, determining in a given jurisdiction that one test should be employed to the exclusion of the others." 2 ALR 4th, 27, 154.

The cases referred to in the annotation from this state are as follows: Coardes v. State,

262 S. C. 493, 206 S. E. 2d 264 (1974); State v. Pendergrass, 270 S. C. 1, 239 S. E. 2d 750 (1977); McCray v. State, 271 S. C. 185, 246 S. E. 2d 230 (1978).

In the McCray case, the Supreme Court of this state speaking through Mr. Justice Rhodes takes note of the then recent decision in Marzullo v. Maryland, 561 F. 2d 540 (4th Cir. 1977), stating, "In Marzullo, the Fourth Circuit Court of Appeals adopted the 'normal range of competency' test as the standard by which the effective assistance of counsel is to be determined, displaced the prior 'farce and mockery' test" State v. McCray, supra, 246 S. E. 2d 232. Judge Rhodes' in this opinion points out that at no point in the appellant's petition for post conviction relief did he allege or contend that his counsel was generally incompetent in the conduct of the trial. From this the authors of the annotation in 2 ALR 4th, 27, 156, take the view that Judge Rhodes' decision points out that even under the stricter pre-Marzullo rule in

South Carolina "representation need not be errorless in order to be effective and a convict generally must establish that his attorney's error was so flagrant that it can be concluded that the error resulted from neglect or ignorance rather than from informed professional deliberation."

It is the position of appellant that the errors committed by his attorney at the trial of the case were so flagrant that it can be concluded that the error resulted from neglect or ignorance rather than from informed professional deliberation. The basis for this argument is set forth as follows:

1. Only neglect or ignorance could have been the reason for trial counsel's allowing the trial to proceed without producing the wife of the appellant as a witness or accounting for her absence. At no point after the argument by counsel for dismissal of the case on the ground of denial of accused's right

to a speedy trial does it appear that he moved for a continuance or endeavored to comply with the provisions of Rule 27 of the Rules of Practice for the Circuit Courts of South Carolina. To have made that motion was the minimum effort that an attorney could make to preserve for the record what was undoubtedly critical testimony to the defense.

* * * * * * *

In view of the fact that appellant testified positively that he was at home with his wife at the time the alleged sales of guns took place, her failure to be there to corroborate that important fact was a fatal flaw in the defense. (Tr. p. 101, L. 17-18).

2. Only neglect or ignorance could have been the reason for trial counsel's failure to subpoena Steve Hinds or account for his absence as a witness. He is supposed to have been the go-between in the transaction giving rise to the charge against appellant. He is

specifically mentioned by name more than a dozen times. * * * * * To leave the record with no corroboration of appellant's testimony that he had never had any conversation with Steve Hinds about these guns was inviting a conviction of the appellant. No trial lawyer would do this on the basis of informed professional deliberation. At the very least, informed professional judgment would have, through cross-examination, established that Steve Hinds was available as a witness to testify if the prosecution thought it would benefit their case to call him. The burden of this non-appearance would then be on the prosecution not on the defense, which was the inevitable impression which the jury got.

3. Only neglect or ignorance could have been the reason for trial counsel's failure to require an inquiry into what, if anything, the juror William Sims had said in the presence of the other jurors about his knowledge of the

facts of the case. The solicitor identified him as "a former guard at the detention center". (Tr. p. 37, L. 15-16). The full transcript reveals that the juror in question had been sitting with the jury for almost an hour. (Tr. p. 5, L. 11; p. 36, L. 9-10). The testimony of two of the prosecution's witnesses had been completed including the principal witness, Stephen Godfrey, identifying Appellant as the person who bought the guns in question. Following a fifteen (15) minute break, it appears that the Bailiff, Mrs. Barnes, informed the trial judge that the forelady and a juror had contacted her. The full transcription of what then took place is as follows:

> COURT: The State is present, and the defense counsel, and the defendant's present, I need to bring something to the attention of counsel, and that is, one of the jurors by the name of Mr. William Sims has told the foreman that he was around the detention center--
>
> MRS. BAILIFF: He said he had a problem.
>
> COURT: He had a problem. Tell us what he said, Mrs. Barnes?
>
> MRS. BARNES (BAILIFF): He said he had

a problem, and she knocked on the door, and she said, 'You better let Mrs. Barnes know.' And then he came out to me and told me that he was in the detention center, or something, when a lot of this was going on about these robberies, and that it worried him. I don't know how much he heard or what he heard.

COURT: What is the position of the State, as far as that juror is concerned?

MR. WELLS: Perhaps the best thing would be to bring him out and question him as to whether or not he should continue to serve. I'm really not sure, from what she said exactly.

COURT: What's the position of the defendant?

MR. MITCHELL: Your Honor, we don't really know him personally and can't quite place him. I'm somewhat inclined to agree with Mr. Wells on that. I'd like to see him and see if we can determine exactly what it is he knows and whether or not he---

COURT: This individual, as I recall, was a former police officer.

MR. WELLS: If you want to excuse him and use the alternate, of course, I have no objection. He was a former guard at the detention center.

MRS. BARNES: That's what he said; he was a former guard.

COURT: What's the position of the defense?

MR. MITCHELL: Your Honor, after conferring with my client, he agrees with this. Rather than move for a mistrial, we would concur in what Mr. Wells said; we'd just excuse him and use the alternate.

COURT: Bring Mr. Sims out.

(Juror William Simms returned to the court room; the following transpired:)

MR. SIMMS: Yes, sir.

COURT: We're going to excuse you from service on this particular jury and let you go now, and ask that you be back out with the rest of the jury panel at 10:00 o'clock tomorrow morning. You may leave at this time.

WHEREUPON, at 4:21 p.m., the jury returned to open court.)

COURT (to the alternate juror, Mrs. Martha McPherson): Mrs. McPherson, circumstances have arisen that I now take you from being an alternate juror and make you a member of the active jury panel. All right, we'll proceed.

Without any explanation from the trial judge the trial continued as though nothing of importance had taken place.

It is inconceivable that any competent attorney defending a client on a criminal charge would have voluntarily forestalled an inquiry by the court as to what Juror Simms said in the presence of the other jurors about the knowledge of this case gained while he was a guard in the detention facility. A careless unguarded remark would have been expected from him. It is almost

as incomprehensible that the trial judge would not for the protection of the interests of the defense and the assurance of a fair trial have insisted on ascertaining if any statements prejudicial to the defense had been made by Juror Sims in the presence of the other jurors. It is, after all, the duty of the trial judge and the solicitor as well as defense counsel to ensure that a defendant gets a fair trial. 75 Am. Jur. 2d, Trials, Sec. 31, p. 144; State v. Sharpe, 239 S. C. 258, 122 S. E. 2d 622 (1962).

It is also error for the trial court not to have instructed or informed the other jurors why Juror Sims was being excused and to ignore any statements he may have made in their presence. This is particularly true in view of the fact that the court did not know what the other jurors might have heard Sims say of a prejudicial nature. There is authority in this state for the prosecution that a trial judge has no power to vacate the seat of a juror who has been sworn in a

criminal case on proof of facts occurring beyond the presence of the court. State v. Stephens, 11 S. C. 319 (1878).

Any counsel truly representing the defendant in this case would have demanded both an inquiry into what took place in the jury room and at the very least an instruction by the court of the other jurors to ignore what may have been said by the excused juror. It is also hard to believe that counsel who two hours previously had been seeking a dismissal partly on grounds that critical witnesses were not available would have, with such alacrity, volunteered that he and appellant would not move for a mistrial, when the granting of a mistrial undoubtedly would have given the time necessary to secure the testimony of appellant's wife and Steve Hinds.

4. Only neglect and ignorance would account for the failure of trial counsel to establish, with clarity, in the direct examination of appellant's mother, Mary P. Gibson, that she had possession of his dove-gray Continental with

license plate "JGG" from March 11 through March 16, 1980. (Tr. p. 128, L. 17-25; p. 129 through p. 135, L. 10). It is only on cross examination by the solicitor is her corroboration of this critical fact made clear. (Tr. p. 136, L. 24-25; p. 137, L. 1-7; p. 139, L. 22-25). This reversal of the proof of a critical fact by one of the three witnesses presented by the defense could hardly be called the outcome of "informed professional deliberation."

5. Only neglect and ignorance not informed professional deliberation could account for trial counsel's allowing the trial judge sua sponte to determine without objection that only the direct testimony of appellant's mother, Mary P. Gibson, would be read. The section of the transcript dealing with the conversation between the trial judge and the forelady has been reproduced in this brief under the discussion of Question II. (App. Brief, p. 7, L. 5-17). Any alert counsel who was paying attention to the record would have objected first to the court's making a determination of

what was to be read to the jury; and second, to the fatal undue emphasis on the weakness of the direct examination which would be placed on Mary P. Gibson's testimony if the direct examination were read without reading the cross-redirect and re-cross.

* * * * * * *

QUESTION V

DID THE TRIAL COURT ERR IN RULING ON A MOTION TO REDUCE THE SENTENCE BY INCREASING APPELLANT'S SENTENCE RATHER THAN REDUCING IT?

On March 17, 1982, immediately following the return of a guilty verdict the trial judge passed sentence on appellant as follows:

> THE COURT: I waive the $20.00 on Indictment 81-675 to the Victim Restitution Fund. The sentence of the court on Indictment 81-675 is that the defendant be confined to the Department of Corrections for the State of South Carolina for a period of three (3) years, and that you thereafter be on probation for a period of three (3) years. Of course you're gonna have to pay the cost of probation while you're on probation.
>
> (Tr. p. 159, L. 8-15).

The written sentence and Order of Commitment signed the same day reads in the pertinent sections as follows:

> The sentence of the court is that the defendant James Gresham Gibson shall be in the custody of the Board of Corrections of the State of South Carolina for a term of Three (3) Years * * * * * * that the * * * * * * and the same * * * * * * said defendant is hereby placed on probation for a period of three (3) years under the supervision of the South Carolina Parole and Community Corrections Board and its agents, subject to the provisions of the laws of this state and the rules and orders of the Board and its agents, with leave that the suspended sentence (sic) may be revoked at any time during the period of probation at Chambers, or in Open Court, upon the recommendation of said Board.
>
> (Tr. p. 162, L. 10-17).
>
> * * * * * * *
>
> SPECIAL CONDITIONS AS ORDER (sic) BY THE COURT: Assessment fee waived. Appeal bond at $8,000.00 to be posted by at least 2 sureties.
>
> (Tr. p. 162, L. 36-37).

Then in the handwritting of Judge Waller, the notation as follows:

> On motion of the defendants attorney this sentence was reconsidered and a new sentence given. (Emphasis supplied). See another form for the probation on final sentence.
> John H. Waller, Jr.
>
> (Tr. p. 162, L. 38-42).

The commitment order has one word struck through and reads as follows:

> IT IS FURTHER ORDERED: that the Sheriff or other law enforcement officers, who have the custody of the defendant, is hereby ordered to deliver said defendant to the Probation Office of this district, or if defendant is under bond, then such bond shall remain in full force until said defendant reports to the Probation Office. The conditions of probation begin ~~xxxxxxx~~ (after service of required portion of suspended sentence). It is further ordered that this order be filed by the Clerk of Court in his office and that he forthwith forward copy (certified) to Probation Office or the South Carolina Parole and Community Corrections Board.
>
> (Tr. p. 163, L. 9-14).

Present counsel on the day following, March 18, 1982 made a motion as follows: "We would like to move for Your Honor to reconsider the sentence, with a view to reducing the sentence. I would like to make the motion; if Your Honor doesn't want to hear it now, since Mr. Mitchell is in Myrtle Beach ---". (Tr. p. 161, L. 10-14). The response of the Court was "Well, I'm right in the middle of a trial, though. But I'll note for the record that I have and retained jurisdiction of this so that I can hear it at a later time even though it may be beyond this week." (Tr. p. 161, L. 15-18).

The trial court heard oral argument on the motion for a "reduction in the sentence" on March 25, 1982. (Tr. p. 164-170). In the course of the argument the court said, "I worried over this sentence when I first imposed it. I think it is extremely evident in the sentence that I gave that I had problems with it, in that I sentenced the gentleman to three years and gave him three years probation, and you and I both know that is just inconsistent. (Tr. p. 167, L. 24-25; p. 168, L. 1-3). After some discussion about the cost of guns stolen the court then announced a "new sentence" as follows:

> THE COURT: All right. The sentence of the Court on Indictment #81-675, after having reconsidered the sentence, taking into consideration that the Defendant is a first offender, taking into consideration that the victims are out and at a loss of $2,000, although I don't favor changing a sentence once it has been imposed, I am going against myself by doing this, and the sentence on Indictment 81-675 is that the Defendant be confined to the Department of Corrections for the State of South Carolina for a period of eight years, but I suspend that upon the service of one year, and that you thereafter be on probation for a period of five years. Of course, you are going to have to pay $120 for each year that you are on probation.

> And within 30 days after you begin your probation, you are to pay $20 to the Victim Restitution Fund on this indictment.
>
> In addition to this, and as a special condition of your probation, is that, within the first year of your probation period, you are to make restitution to Mr. Thomas Stroman in the amount of $2,000.
>
> (Tr. p. 169, L. 20-25; p. 170, L. 1-13).

This sentence, in written form, dated May 25, 1982 is set forth in the Transcript of Record on pages 171 and 172. The court in the second sentencing of appellant gave a longer sentence (8 years instead of 3 years); a longer probationary sentence (5 years instead of 3 years); required restitution in the amount of $2,000, where none had been required in the first sentencing; and required an assessment fee of $20.00, whereas, the first sentence specifically waived that fee. The actual prison time to be served under the two sentences is virtually identical because of the provisions of Section 24-21-610, Code of Laws of South Carolina, 1976. The authority for suspending prison sentences if found in Code

Section 24-21-410 and the authority for placing conditions on a probationary sentence is found in Section 24-21-430.

It is apparent on the face of the record that the trial court did not reduce the sentence given on March 17th, but in passing on a motion to reduce the sentence substantially increased it. Perhaps part of the confusion in the court's second sentence was the realization by the court that the general law in this state requires that uncertainties and ambiguities in a sentence will normally be resolved in favor of a prisoner. Polk v. Manning, 224 S. C. 467, 79 S. E. 2d 875 (1954). If the March 17th sentence were construed that way, then the sentence is susceptible to the favorable inference that that 3-year prison sentence was suspended and the appellant was put on three years probation.

That the March 17th sentence was partially executed appears on the face of the record. (Tr. p. 160, L. 3-25). The sentence required the appellant to stay in custody of the Sheriff of

Florence County unless an $8,000 appeal bond was posted. That he was in constructive if not actual custody is clear in the record. Mr. Mitchell asked "Your Honor, due to the hour, is there any way that he [appellant] can be released tonight and post an appeal bond on ..." (Tr. p. 169, L. 6-8). But the court refused that request and instructed counsel to file the appeal bond "so you can get him out tonight." (Tr. p. 160, L. 23).

The general law in this country is that the court of original jurisdiction has plenary power over its judgments during the term at which they are rendered and that the court may amend a sentence during that term by reducing the punishment to be served in the new sentence may place the defendant on probation. 21 Am. Jur. 2d, Criminal Law, Sec. 582, p. 971. There is also authority in this country to the effect that where a valid judgment and sentence have been rendered, the court has no jurisdiction, after the sentence has been executed in whole or in part, to set it aside and impose a new sentence even though the sentence is reduced

and the court acts within the term. 21 Am. Jur. 2d, Criminal Law, Section 582, p. 971. Appellant urges this court to adopt the rule that once the sentence has been executed in whole or in part that the trial judge in passing on a motion to reduce the sentence made within the term may only reduce the sentence, not make it more severe.

The question then is, did the trial court act illegally and abuse its discretion by increasing rather than decreasing the sentence when the motion was heard the following week? To increase the punishment meeted out to appellant earlier, would, in effect, violate the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution and the similar provisions of the State Constitution. It would also violate the prohibition of both constitutions against double jeopardy. Patton v. North Carolina, 381 F. 2d 636, (4th Cir. 1867), Cert den. 390 U. S. 905, 19 L. Ed. 2d 871, 88 S. Ct. 818.

* * * * * * *